

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2008 Session

STATE OF TENNESSEE v. DAVID EUGENE THOMPSON

Direct Appeal from the Circuit Court for Giles County
No. 12293 Jim T. Hamilton, Judge

No. M2007-01800-CCA-R3-CD - Filed December 16, 2008

The defendant, David Eugene Thompson, was convicted of criminally negligent homicide, a Class E felony, and sentenced to eighteen months in confinement. On appeal, the defendant argues that the evidence was insufficient to support his conviction. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Raymond W. Fraley, Jr., Fayetteville, Tennessee, for the appellant, David Eugene Thompson.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Patrick Butler and Richard H. Dunavant, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

Justin Young testified that he was a Deputy Sheriff with the Pulaski Police Department in Giles County on May 9, 2004, when he was called to a disturbance at the Broken Spoke Tavern in Pulaski, Tennessee. According to the report he received, two individuals had knocked other customers down in the bar before driving away in a pickup truck. The two men were armed and fired a gun as they drove away. When Officer Young arrived at the scene, the defendant was standing out in front of the bar, pointing at a pickup truck across the street and warning Officer Young to be careful because the men had guns. Officer Young and Officer Braden approached the truck and asked the man in the passenger seat to get out several times. The man did not respond. Officer Young removed him from the truck, cuffed him, and placed him in the back seat of his patrol car. Officer Young identified the passenger as Cameron Grisham. Officer Young stated that Mr. Grisham did not have a gun and Officer Young did not see one in the truck.

Officer Young stated that he returned to the truck to check on the driver. Officer Young identified the driver as the victim, Ryan Slaton. He noted that the victim had lacerations on the back side of his head and was bleeding from his nose. The victim had a pulse but was unresponsive to Officer Young's commands. Officer Young radioed for an ambulance. Officer Young observed that the back window of the pickup truck had a spider-web fracture centered around a bullet hole. Paramedics examined the victim closely and noted that what first appeared to be a laceration to the back of the head was actually a bullet entry wound.

Officer Young testified that the defendant told him that the victim and Mr. Grisham were highly intoxicated when they came to the Broken Spoke earlier that evening. One of the two men tripped and knocked a female customer on the floor, breaking her wrist. Later, a fight broke out between the victim and another customer. The defendant told Officer Young that he separated the customer and the victim. He asked the victim and Mr. Grisham to leave the bar. The two men were angry. They got into the victim's pickup and began reversing and pulling forward at a high rate of speed, causing gravel and rocks to shoot from the truck's tires and hit the motorcycles parked in front of the bar. The men continued to drive erratically while yelling profanity and gesturing explicitly. The defendant told Officer Young that after several minutes, the truck crossed the road and struck a tree. Officer Young stated that during the defendant's recitation of events, he did not mention anything about a gun. Officer Young recalled that while inspecting the victim and the victim's truck, the defendant approached numerous times and Officer Young instructed the defendant to get back. Officer Young later learned that two other customers, Jay Lee McConnell and Kenneth Crumbley, left the scene prior to his arrival.

Donald Wade Ward testified that he was a Deputy Sheriff with the Pulaski Police Department in Giles County. He was assigned to the night shift on May 9, 2004, when he responded to the scene at the Broken Spoke. He received a dispatch stating that an officer was already on the scene, that shots were fired, and the occupants of the wrecked vehicle may have been armed. When he arrived, he saw Officer Young holding the victim's head from the back of the truck. Officer Ward stated that he had responsibility for the crime scene after it was determined that the victim's death was an apparent homicide. Officer Ward spoke to the defendant a couple of times but did not have a conversation with him. He was forced to repeatedly tell the defendant to step away from the vehicle and the scene. Officer Ward spoke with Cameron Grisham and assessed his sobriety. He stated that four hours after the incident, Mr. Grisham was able to speak plainly but could not recall much about events earlier that evening.

Samantha Richardson testified that she was a bartender at the Broken Spoke Tavern on the night of the shooting. She testified that the victim and another customer named "Patio" got into a fistfight. Patio struck the victim in the face and knocked him to the ground. The defendant and another customer halted the fight. Patio was escorted to the back of the bar. The victim was allowed to clean himself up in the bathroom and then escorted outside to the parking lot. Ms. Richardson stated that she stayed in the bar. She heard the victim spinning his truck tires on the gravel and saw dust through the windows. Minutes later, the defendant came back inside and told Ms. Richardson

that the victim was not leaving quietly. He told her that the gravel the victim was kicking up was damaging the motorcycles. She stated that the defendant grabbed a stick from behind the bar and went back outside to get the victim to leave.

Ms. Richardson testified that moments later, the defendant returned a second time and got a gun which he kept underneath the bar. The defendant stated, "I really hate to do this. Why do people make me do this." Ms. Richardson did not know what the defendant was referring to. Ms. Richardson's sister, Jennifer McCune, followed the defendant outside. Ms. Richardson did not go outside. Instead, she kept the other customers inside the bar. She heard gunshots, and then the defendant came back inside and said, "We have to call the ambulance; give me the phone. I'm going to call the ambulance." The defendant told everyone in the bar that a fight got out of hand and that "[n]obody seen nothing that went on outside so nobody knows anything that went on outside." She noticed that the defendant did not have the gun in his hands when he came back into the bar. The defendant asked for Clorox to clean the blood off the sink and off of his hands. She saw him walk out of the bathroom drying his arms.

Ms. Richardson testified that after police finished processing the scene, the defendant went to talk to investigators at the police station. Ms. Richardson, her sister Jennifer, and the defendant's cousin, Chris Hardy, were present when the defendant told them, "I'm glad that motherfucker is dead." According to Ms. Richardson, the defendant also stated, "[T]hat motherfucker deserved to die. Stupid motherfucker's [sic] like that deserve to die. That's how we'll handle our business from now on. We'll do what we have to do and then we'll call the cops." Ms. Richardson said that the defendant, McCune, and Hardy talked about how they sabotaged the scene by throwing extra, spent bullet shells on the ground. They mentioned that the cops would not be able to find the gun. The defendant stated, "I'm glad I popped that mother-fucker. That mother got what he deserved." Ms. Richardson stated that she could not remember what the gun looked like.

On cross-examination, Ms. Richardson testified that when the fight between the victim and Patio occurred, she was only able to recall that the victim got hit in the face and fell to the ground. She stated that Ms. McCune helped the victim to the bathroom and gave him tissue for his bleeding nose. Ms. Richardson reiterated that she heard several gunshots. After the gunshots, the defendant walked back in the bar, got the phone from Ms. Richardson, and went back outside to call the police. Ms. Richardson stated that she did not know that the victim had been shot and killed until a police officer entered the bar and told her. She admitted that when police questioned the defendant later, he gave them another gun that he kept behind the bar by the pizza maker. Ms. Richardson could not identify the caliber or model of either gun owned by the defendant.

Jennifer McCune testified that she was the defendant's girlfriend and was working with her sister, Samantha Richardson, as a bartender at the Broken Spoke on the night of the shooting. Ms. McCune recalled that the victim came to the bar that night with a friend named Cameron. According to Ms. McCune, the two men were intoxicated and had been at another bar prior to their arrival at the Broken Spoke. She saw the victim and a customer known as "Patio" argue. Patio played a song on the jukebox, and the victim said something to him. Patio hit the victim in the face and the victim

fell backwards, breaking off the edge of the bar. The defendant took the victim to the bathroom to clean up. The defendant asked the victim and Mr. Grisham to leave the bar. Ms. McCune walked into the bathroom to check on the victim. The victim said that he didn't understand why he was being asked to leave. Ms. McCune told the victim that he and Mr. Grisham had come to the bar intoxicated, and because of the fight, it was better if they left. The two men left the bar. The victim said he couldn't believe "they were making me leave" and banged his arms up against his truck. Ms. McCune stated that the defendant was outside with the two men and she was standing at the side door of the bar. The victim got into his truck. Mr. Grisham opened the passenger door to the truck and said, "[T]hat's alright, I've got something in here to take care of you all." The victim appeared to have something in his hand.

Ms. McCune testified that the victim was reversing and pulling forward quickly, kicking up dust and gravel. Ms. McCune stated that she was aware there was a gun under the bar that evening. The defendant went back inside and got the gun out from under the bar. As he prepared to walk back outside, the defendant said, "I hate when people make me do stuff like this," and asked for his cell phone.

Ms. McCune testified that Jay Lee McConnell and Chris Hardy were also outside the bar. Mr. Hardy was behind a fence at the back of the bar and Mr. McConnell was at the front of the bar to the side of the parking lot. According to Ms. McCune, the defendant fired his gun four times. She stated that the gun was a .38 caliber revolver. The defendant walked toward the victim's truck as he fired at it. After the third shot, the victim's truck veered across the grass. As the truck headed across the grass, it grew quiet, as though it was no longer accelerating. The truck came to a stop after it crossed the road and hit a tree.

Ms. McCune testified that after the victim's truck hit the tree, she went back into the bar. Approximately five minutes later, the defendant re-entered the bar. The defendant stated, "I hate when people make me do things like that. This dumb mother-fucker got what he deserved." The defendant then called the police, informed them of the altercation, and requested assistance. The defendant went into the bathroom with a bottle of Clorox and washed his hands and arms. He told Ms. McCune, "[t]hat's how we're going to take care of things from now on; do it our self [sic] instead of calling the police." The defendant told her that she did not see anything and did not know what had happened. He stated that as long as everyone stuck to that story, everything would be fine.

Ms. McCune testified that she lived with the defendant at a house owned by Chris Hardy, the defendant's cousin. She saw the defendant when he returned home that afternoon after he was interviewed by police. Chris Hardy and Ms. McCune's sister, Samantha Richardson, were also present. According to Ms. McCune, the defendant said that the police did not have any evidence to pin the crime on him. The defendant asked her if she thought he had done the right thing. She told him "yes."

Ms. McCune testified that later that day, she was riding in a car driven by the defendant. The defendant drove her to a spot under a bridge and stopped. The two were seated in the car talking when the defendant put a gun to the back of her neck and threatened her. The defendant

stated that if anyone were to find out about what had happened, then “we’ll know where it’s come from. And you’ll be the next little bitch they find floating down the Tennessee river.”

On cross-examination, Ms. McCune acknowledged that she made four separate statements to police. She stated that any conflicts in her statements occurred because the defendant threatened her and she was afraid of him. She stated that she did not want to make a statement that the defendant killed the victim if the defendant was not in custody.

Ms. McCune testified that she perjured her testimony at the preliminary hearing. She admitted that she lied about the defendant’s handing the victim paper towels with Clorox and helping the victim clean himself up after the fight. She acknowledged that her statement that the defendant had blood on his hands was false. She testified at the preliminary hearing that when the defendant fired his gun, he only shot once. She also stated at the preliminary hearing that there was an altercation between Mr. McConnell and the victim. At trial, she recalled that she was not aware of any conflict between the two men. Ms. McCune admitted she perjured herself when she testified at the preliminary hearing that Mr. McConnell fired twice at the victim’s truck. At trial, she stated that she saw Mr. McConnell fire once in the truck’s general direction. She said that she blamed the incident on Mr. McConnell because she feared that the defendant was not going to jail for what happened and she feared what he would do to her.

Ms. McCune testified at the preliminary hearing that she saw the defendant shoot at the victim’s truck one time. She stated at trial that “if I said I seen him fire once, that - it wasn’t as bad as ‘I seen him fire four times and shoot [the victim].’” She admitted that she falsified her preliminary hearing testimony that the defendant fired in the general direction of the victim’s truck. She acknowledged that the defendant fired directly at the truck while walking toward it. After the third shot, the truck veered off the road and hit the tree. She asserted that after the third shot, she turned and went back inside the bar. She reiterated that the defendant fired a total of four shots. She acknowledged that in her third statement to police, she claimed that she did not see the victim’s truck hit the tree until she went back into the bar and looked outside through a window.

Ms. McCune testified that she knew the defendant had the gun when he went outside the second time. According to Ms. McCune, when the defendant returned, he did not have the gun. At the preliminary hearing, she stated that the defendant’s gun was black. At trial, she testified that the defendant’s gun was silver. Ms. McCune claimed that after the shooting occurred, she had no other contact with the defendant. She identified a “love letter” written in her handwriting but denied that the letter was sent to the defendant after he got out of jail. She stated that she could not recall when she sent the letter because she was on methamphetamine. She admitted she was on methamphetamine the night of the shooting and later when she was interviewed by police officers. Ms. McCune claimed that she was not currently on drugs and could remember everything that happened on May 9.

Ms. McCune acknowledged that she had contact with the defendant after the shooting. She tried to talk to the defendant several times. When she spoke to him, he got angry, swore at her, and

refused to talk to her. Ms. McCune denied that she was in a motorcycle accident with the defendant after the shooting. Later, at the request of police officers, and in their presence, she called the defendant in an attempt to have him admit over the phone that he killed the victim. She stated that the defendant knew the phone call was being recorded and refused to say anything incriminating.

On re-direct examination, Ms. McCune admitted that she was in a motorcycle accident with the defendant approximately three weeks after the shooting. She claimed that it took her some time to separate herself from the defendant. She reiterated that on the morning of the shooting, she told a police officer that she would not say anything about what had happened as long as she was around the defendant or the Broken Spoke Tavern.

Patrick Walf testified that he was at the Broken Spoke on the night of the shooting when he got into an altercation with the victim. According to Mr. Walf, he was playing pool with the victim and his friend, Kenneth Crumbley. Both men were drunk. The victim got angry when Mr. Walf played a song on the jukebox. The argument escalated until Mr. Walf punched the victim and knocked him down. After punching the victim, Mr. Walf was escorted to the back of the bar.

Mr. Walf testified that at the time of the shooting, he went by the nickname "Patio." He stated that from his position behind the building, he could not see what happened in the parking lot. He recalled hearing the defendant's voice, the truck revving up, and later hearing a "pop, pop" sound. After hearing shots fired, Mr. Walf walked around the bar and reentered through the front door. As he walked toward the front of the bar, he noticed a pickup truck across the street in the woods. He stated that "[p]robably half the people that were over there" went outside in front of the bar. The defendant told the customers to go back inside. The defendant stated that the police would probably try to pin the shooting on Mr. Walf because he fought the victim. The defendant told Mr. Walf he could leave. Mr. Walf waited to speak to police, who arrived shortly.

Kenneth Crumbley testified that he went to the Broken Spoke Tavern on May 9 with his friend Jay Lee McConnell. He stated that he was commonly known by his nickname, "Bushhog." He recalled that the victim came in the bar with a friend and was "staggering drunk." According to Mr. Crumbley, Patrick Walf instigated a fight with the victim. After Mr. Walf hit the victim in the face and knocked him down, Mr. Crumbley called for the defendant. The defendant instructed Mr. Walf to go outside and told the victim that he had to leave. The victim became belligerent and pulled out a knife. Mr. Crumbley and the defendant told the victim to put the knife away and the victim complied. The victim was followed outside by the defendant and others from the bar, including Mr. Crumbley. The victim pounded the side of his pickup truck in frustration. Mr. Crumbley stated that Mr. Walf came around the outside of the bar and threatened to fight the victim again. Mr. Crumbley stopped him and took him inside the bar. Moments later, the defendant entered the bar, grabbed a stick and went back outside. It appeared to Mr. Crumbley that the defendant had a pistol grip sticking out of his back pocket. Mr. Crumbley heard a truck revving and gravel "spinning." The next thing he heard was "pop, pop, pop, pop." After he heard the "pops," he ran out the door and encountered Mr. McConnell. The two men jumped in Mr. Crumbley's car and left the scene. A short time later, Mr. McConnell told Mr. Crumbley to turn around and go

back. As they drove back by, they passed the victim's truck which had run off the road and hit a tree. A police officer was already at the scene.

Mr. Crumbley testified that after leaving the bar, Mr. McConnell told him he had a gun and shot it as the victim was backing his truck up. Mr. Crumbley stated that Mr. McConnell had just had a son. Mr. Crumbley took the gun from Mr. McConnell, ground it into several pieces with a hand grinder, took it to his nephew's farm, and disposed of it. He later confessed to grinding up the gun and provided the remaining pieces to the Sheriff's Department. He identified the gun as a Highpoint .9 millimeter pistol. He stated that from the time he and Mr. McConnell left, until the time they returned, was "just a couple of minutes."

Cameron Grisham testified that he met the victim at another bar earlier that evening and the two men decided to go to the Broken Spoke. Mr. Grisham stated that he was highly intoxicated and could not recall much about that evening. He recalled being asked to leave the bar and driving fast in the victim's truck in the parking lot. The only other thing he remembered was the deputy knocking on the passenger window.

Michael Chapman testified that he was the Chief Investigator with the Giles County Sheriff's Department. He was summoned to the scene at the Broken Spoke in the early morning of May 9. When he arrived, three deputies, an ambulance, and members of the Highway Patrol were working the scene. He noticed the victim's pickup against the tree and the victim slumped over in the front seat, deceased. He learned that two customers, Jay Lee McConnell and Kenneth Crumbley, had left the scene. Investigator Chapman collected items from the bar, including paper towels with blood on them and a .380 caliber semi-automatic pistol from the defendant. He also collected two .9 millimeter cartridge casings and a hawksbill knife from the front pocket of the victim. According to Investigator Chapman, the defendant volunteered that he also possessed a .38 caliber revolver but stated that it was at his cousin's house. Investigator Chapman told the defendant to bring it to him when the defendant located it. On July 15, 2004, the defendant brought a .38 caliber revolver to the Sheriff's Department. Investigator Chapman stated that he did not believe it was the same gun used to shoot the victim and had no expectation that the gun would match the bullet collected from the victim's head.

On cross-examination, Investigator Chapman testified that the bullet taken from the victim's head did not match the .380 pistol the defendant provided him. He stated that the bullet from the victim's head was sent to the Tennessee Bureau of Investigation (TBI) for testing to see if it matched the .380. Test results showed the bullet was not a match. Investigator Chapman admitted that after the defendant provided him with the .38 caliber revolver, he sent the bullet from the victim's head back to the TBI to have it tested against that gun. The lab report that came back indicated that the bullet did not match the .38. He confirmed that after interviewing Jennifer McCune, he had some suspicion that she was on methamphetamine.

Jay Lee McConnell testified that on May 9, he arrived at the Broken Spoke at around 9 p.m. with Kenneth Crumbley. Later that evening, the victim and Mr. Grisham came into the bar. Mr.

McConnell recounted that he had a conversation with the victim about Mr. McConnell's tattoos but the two men did not have an altercation. According to Mr. McConnell, Patrick Walf, a.k.a. "Patio," played a George Jones song on the jukebox. The victim told Mr. Walf that "[a]nybody that play a George Jones' song is . . . an asshole." Mr. Walf hit the victim in the face and knocked him to the ground. The defendant came out of the bathroom and saw what happened. He got tissue for the victim and told him that he needed to leave.

Mr. McConnell testified that he followed the defendant, the victim, and several other bar customers outside. The victim was yelling, cursing, and hitting his pickup truck. The defendant asked the victim to leave several times. The victim got in his truck and pulled away as though he was going to leave. He began reversing and pulling forward, kicking up gravel and shooting rocks and dust all over the motorcycles in the parking lot. Mr. McConnell stated that he was standing to the right of the victim's truck. He ran over to Mr. Crumbley's truck and got his pistol, a .9 millimeter automatic. When he returned to the parking lot, he saw the defendant standing in the driveway with a stick in his hand. Mr. McConnell fired two shots from his gun.

Mr. McConnell testified that the victim continued to pull back and forth spewing gravel and dirt everywhere. The defendant walked back into the bar. Moments later, he came outside and Mr. McConnell could see that the defendant had a gun in his back pocket. He testified that he had seen that particular gun at the bar before and described it as a .38 revolver. Mr. McConnell recounted that the defendant walked up to the side of the victim's truck and shook the gun at him. The defendant and the victim cursed at each other. The victim pulled toward the street again, and then backed up again. The defendant fired his gun several times at the victim's truck. The truck accelerated across the parking lot and veered across the road before hitting a tree.

Mr. McConnell testified that after the victim's truck hit the tree, he took off running. He admitted that he committed aggravated assault by firing his gun at the victim's truck. He and Mr. Crumbley left the bar. After driving a short distance, Mr. McConnell told Mr. Crumbley to turn back because he wanted to see if the victim was deceased. When they returned to the scene, police had arrived. The men drove past the scene, and Mr. Crumbley took Mr. McConnell to Mr. Crumbley's house. Two to three days later, the men ground up Mr. McConnell's gun with a hand grinder.

On cross-examination, Mr. McConnell testified that he was indicted for the first-degree murder of the victim on November 9, 2005. He acknowledged that he was allowed to plead guilty to aggravated assault for firing his weapon. In exchange for his testimony at trial, the first-degree murder charge against Mr. McConnell would be dismissed and he would receive supervised probation. He denied that he had a dispute with the victim in the bar about joining the Klu Klux Klan. He also denied that he told the customers outside, "I'd wish he'd come out here, I've got something for him." Mr. McConnell later admitted that he went outside before the victim and the defendant came out of the bar to "get away from it all." He was outside approximately twenty minutes before the defendant and the victim came outside. He stated that he knew he did not shoot the victim because after he fired his shots, the victim pulled around the parking lot again. He stated

that it was not until the defendant fired at the victim's truck at close range that the victim lost control, crossed the road, and hit a tree. Mr. McConnell reiterated that the .38 revolver that the defendant had shown him on previous occasions was the same gun he saw in the defendant's back pocket on the night of the shooting.

Robert Royse testified that he was a Special Agent with the TBI and specialized in firearms identification. Agent Royse examined the bullet taken from the victim's head and concluded that the bullet was either a .38 caliber or .357 caliber round-nosed, lead bullet. He stated that it was impossible to specifically identify the exact caliber because a .38 caliber bullet can be fired from a .357 caliber weapon and vice versa. Agent Royse testified that it was unlikely that the bullet recovered from the victim's head was fired from a .9 millimeter weapon.

After a jury trial, the defendant was convicted of criminally negligent homicide, a Class E felony, and sentenced to two years in the Tennessee Department of Correction. The trial court modified the defendant's sentence to eighteen months by written order on August 8, 2007. The defendant filed a timely notice of appeal.

II. ANALYSIS

The defendant argues as his only issue on appeal that the evidence was not sufficient to sustain his conviction for criminally negligent homicide.

Upon review, we recognize the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to the appellate court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); see also Tenn. R. App. P. 13(e). The jury's verdict, once approved by the trial judge, accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value given to the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

Criminally negligent homicide is defined as "[c]riminally negligent conduct that results in death." Tenn. Code Ann. § 39-13-212(a). A person commits criminally negligent homicide when his conduct or the result of that conduct causes the death of another person, and by his conduct it is evident that he failed to perceive a substantial and unjustifiable risk that a result would occur

(namely, death). “The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.” Tenn. Code. Ann. §§ 39-11-106(a)(4); -302(d).

The defendant argues that Jennifer McCune’s testimony was not credible and points to inconsistencies between her testimony at the preliminary hearing and her trial testimony. He also points to statements Ms. McCune acknowledged were perjured. The defendant asserts that Ms. McCune’s contradictory testimony under oath subjects her to the rule of cancellation. However, we do not agree. In *State v. Caldwell*, 977 S.W.2d 110 (Tenn. Crim. App. 1997), this court explained that the rule of cancellation applies in limited circumstances:

The rule of law in Tennessee is that contradictory statements made by a witness as to the same fact can cancel each other out. *Taylor v. Nashville Banner Publ’g Co.*, 573 S.W.2d 476, 482 (Tenn. App. 1978). However, this rule applies only when inconsistency in a witness’s testimony is unexplained and when neither version of his testimony is corroborated by other evidence. [*Id.* at] 483.

Id. at 118; *see also State v. Matthews*, 888 S.W.2d 446, 449 (Tenn. Crim. App. 1993). In the instant case, Ms. McCune explained that her inconsistent statements to police and her false preliminary hearing testimony were either directly related to her fear of the defendant or due to her drug consumption. She testified at trial as to the reasons for her inconsistent or perjured statements. Because she explained her rationale, Ms. McCune’s testimony did not qualify under the rule of cancellation. Moreover, aspects of her testimony at trial were corroborated by the testimony of Jay Lee McConnell and Samantha Richardson. The jury was provided with direct and circumstantial evidence it could use to evaluate the veracity of her testimony. As stated previously, questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value given to the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *Bland*, 958 S.W.2d at 659.

Similarly, the defendant argues that the testimony of the only other eyewitness to the shooting, Jay Lee McConnell, is not credible because he was indicted for the murder of the defendant, and he testified in exchange for supervised probation on his ten-year, aggravated assault conviction. The defendant also argues that Mr. McConnell fired shots at the victim’s truck and fled the scene before police officers arrived. However, Agent Royse testified that Mr. McConnell’s .9 millimeter pistol did not match the .38 or .357 caliber bullet retrieved from the victim’s head. Ms. McCune’s testimony corroborated Mr. McConnell’s testimony that the victim continued driving after Mr. McConnell shot in his direction. It was not until the defendant fired at the victim at close range that the victim lost control of the truck.

Upon review of the record, we note that facts supporting the defendant’s conviction were substantiated by the testimony of Jennifer McCune and Jay Lee McConnell. The defendant escorted the defendant from the bar to his pickup truck. The two men had an altercation outside and the

defendant repeatedly asked the victim to leave. The victim got in his truck and began pulling back and forth recklessly, shooting gravel at the motorcycles parked outside. The defendant went back inside the bar, retrieved a stick, and returned outside to stop the victim. Moments later, the defendant went back into the bar and obtained a .38 caliber revolver. The defendant shot at the victim's truck four times. Both Ms. McCune and Mr. McConnell testified that the defendant aimed directly at the victim and shot at close range. After the third shot, the victim's truck veered across the grass, crossed the road, and hit a tree. The testimony of Ms. McCune and Mr. McConnell was further corroborated by the testimony of Samantha Richardson. Although she did not witness the shooting, she heard the defendant admit that the victim died as a result of his actions.

In addition to the direct evidence detailed above, there was substantial circumstantial evidence to support the defendant's conviction. Although the murder weapon was never identified, the defendant's statement that police would not be able to find the gun provided an inference that he was involved in the destruction or concealment of the murder weapon. He stated repeatedly that "that motherfucker got what he deserved." He asserted that as a matter of general policy he would take care of things himself instead of calling police. He asked Ms. McCune in the presence of Samantha Richardson and Chris Hardy if she thought he had done the right thing and later threatened Ms. McCune with death if she ever told what she knew.

We conclude that there was ample direct and circumstantial evidence on the record to support the defendant's conviction for criminally negligent homicide. It was within the province of the jury to determine that shooting directly at the victim's truck from close range constituted the type of negligent conduct which was "a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances" and resulted in the victim's death. *See* Tenn. Code Ann. § 39-11-302(d); § 39-13-212. Therefore, the defendant is not entitled to relief as to this issue.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

J.C. McLIN, JUDGE